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No. 99-830

Supreme Court, U.S.
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In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I. Whether the Eighth Circuit's adoption of a broad unconstitutional reading of Nebraska's ban on partial-birth abortion, which directly conflicts with the narrower constitutional construction of similar statutes by the Seventh Circuit Court of Appeals and that of the state officials charged with enforcement of the statute, violates fundamental rules of statutory construction and basic principles of federalism in contradiction of the clear precedent of this Court?

II. Whether the Eighth Circuit misapplied this Court's instructions in ***Planned Parenthood v. Casey*** by finding that a law banning a rare and controversial method of killing a partially-born child, is an "undue burden" on the right to abortion?

LIST OF PARTIES

The Petitioners are Don Stenberg, Attorney General of the State of Nebraska; Gina Dunning, Director of Regulation and Licensure of the Nebraska Department of Health and Human Services; and Charles Andrews, M.D., Chief Medical Officer of the State of Nebraska. An additional Appellant/Defendant below was Mike Munch, Sarpy County Attorney.

The Respondent is LeRoy H. Carhart, M.D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 192 F.3d 1142 (8th Cir. 1999) (Pet.App.1).[1] The opinions of the United States District Court for the District of Nebraska in this case are reported at 972 F. Supp. 507 (D.Neb. 1997) (Supp.App. 91) and 11 F. Supp.2d 1099 (D.Neb. 1998) (Supp.App.1).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 24, 1999. A Petition For Writ of Certiorari was filed on November 15, 1999. Certiorari was granted on January 14, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Neb. Rev. Stat. § 28-326(9):

> Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living

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[1] References to the Appendix to the Petition For Writ of Certiorari will be noted as "Pet.App. ___." References to the Supplemental Appendix to the Petition For Writ of Certiorari will be noted as "Supp.App. ___." References to the Joint Appendix will be noted as "J.A. ___." References to the Record Transcript will be noted as "R.Tr. ___." References to non-transcript portions of the Eighth Circuit Appendix will be noted as "Eighth Cir. App. ___."

unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

II. Neb. Rev. Stat. § 28-328(1)-(4):

(1) No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.

(3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

(4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure. . . .

III. U.S. Const. amendment XIV:

The Fourteenth Amendment provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

I. STATEMENT OF THE CASE

In the past five years the nation has witnessed an outpouring of public concern over a controversial medical procedure legally denominated as "partial-birth abortion" and now referred to medically as "D&X" abortion.

The United States District Court for the District of Nebraska described the partial-birth abortion/D&X procedure as follows, based on testimony by the Respondent in the present case:

> When the fetus is presented feet first, Carhart, using forceps, pulls the feet of the living fetus from the uterus into the vaginal cavity and then pulls the remainder of the fetus, except the head, into the vaginal cavity to a point where the base of the fetal skull is lodged in the uterine side of the cervical canal. At that point, the size of the head will not permit him to pull it through the cervical canal into the vaginal cavity. To decompress the fetal skull and evacuate the contents in order to pull it through the cervical canal, Carhart uses an instrument to either tear or perforate the skull to allow insertion of a cannula and removal of the cranial contents. Sometimes he will crush the skull rather than pierce it in order to reduce the size of the skull. Brain death occurs sometime during this two-to-three-second reduction procedure, but fetal heart function may continue for several seconds or minutes after the fetus's skull is decompressed.

Carhart v. Stenberg, 11 F. Supp.2d 1099, 1106 (D.Neb. 1998) (Supp.App. 17).

One nurse who personally observed the partial-birth abortion/D&X procedure stated, "I have been a nurse for a long time, and I have seen a lot of death – people maimed in auto accidents, gunshot wounds, you name it. I have seen surgical procedures of every sort. But in all my professional years, I had never witnessed anything like this." *Partial-Birth Abortion Ban Act, 1995: Hearings on H.R. 1833 Before the Senate Judiciary Committee,* 104th Cong. 17-18 (1995) (Statement of Brenda Pratt Shafer, R.N.).

Nurse Shafer described the procedure's effect on a partially-born child as follows:

> [The doctor] brought the ultrasound in and hooked it up so that he could see the baby. On the ultrasound screen, I could see the heart beat. As [the doctor] watched the baby on the ultrasound screen, *the baby's heartbeat was clearly visible on the ultrasound screen.*
>
> [The doctor] went in with the forceps and *grabbed the baby's legs and pulled them down into the birth canal.* Then he delivered the baby's body and the arms – everything but the head. *The doctor kept the head right inside the uterus. . . .*
>
> *The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.*
>
> *The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.*
>
> I was really completely unprepared for what I was seeing. I almost threw up as I watched [the doctor] doing these things. Next, [the doctor] delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used. I saw the baby move in the pan. I asked another nurse, and she said it was just reflexes.

Id.

The reaction to the development of this procedure has been truly unprecedented. Nation-wide, large bi-partisan majorities consisting of both pro-choice and pro-life legislators have voted to ban the procedure in thirty

States and both Houses of Congress. The general public clearly does not view the procedure as falling within the liberty right protected by ***Roe v. Wade*** and ***Casey*** due, in large part, to the fact the child is primarily outside the womb when it is killed. The Nebraska Legislature, with only one dissenting vote, passed a ban on the partial-birth abortion/D&X procedure which was signed into law on June 9, 1997. Nebraska's statute was patterned closely after language passed by both Houses of Congress.

Just three days after enactment of Nebraska's statute, and before the statute had been applied in any setting, LeRoy Carhart, a Bellevue, Nebraska physician who performs late-term abortions, filed a pre-implementation Complaint challenging the constitutionality of the statute on its face. On June 17, 1997, the United States District Court for the District of Nebraska entered a Temporary Restraining Order preventing enforcement of the statute. The TRO remained in effect pending disposition of the Plaintiff's Motion For Preliminary Injunction which was heard on July 17 and 18, 1997. On August 14, 1997, the district court entered a preliminary injunction against enforcement of the statute.

Following additional discovery, a trial on the merits was held on March 24, 1998, at which time additional testimony and evidence were received. On July 2, 1998, the district court permanently enjoined enforcement of the statute. Final Judgment was entered on August 10, 1998. A timely appeal was taken to the Eighth Circuit Court of Appeals, and on September 24, 1999, that court affirmed the judgment of the district court.

Notwithstanding the fact that Nebraska's chief legal officer construes the statute as banning only the D&X abortion procedure, the Eighth Circuit read Nebraska's statute as banning both the partial-birth abortion/D&X procedure and the more common D&E procedure. The panel did not reach the issue of whether a State may enact a statute limited only to the D&X procedure, but

concluded that a prohibition encompassing the D&E procedure "imposes an undue burden on a woman's right to choose to have an abortion." ***Carhart v. Stenberg,*** 192 F.3d 1142 (8th Cir. 1999) (Pet.App. 19). A Petition For Writ of Certiorari was filed on November 15, 1999, and on January 14, 2000, the Court entered an order granting the Writ.

II. SUMMARY OF THE ARGUMENT

Over the last five years, thirty States and both Houses of Congress have attempted to regulate an abortion procedure that, in their judgment, is medically unnecessary and looks disturbingly close to infanticide. Supported by Democrats and Republicans, pro-choice and pro-life advocates and medical and non-medical interest groups, partial-birth abortion regulations represent a broad based response to an abortion procedure that was virtually unknown until 1995 and which is widely viewed as outside acceptable medical practice. The American Medical Association has concluded "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion." ***Hope Clinic v. Ryan,*** 195 F.3d 857, 872 (7th Cir. 1999) (*quoting* AMA Policy H-5.982). To prevent the use of this procedure in Nebraska, the citizens of the State responded with the legislation now before the Court. Patterned after the federal bill passed by both Houses of Congress, the Nebraska law bans "partial-birth abortions," and does so in a constitutionally permissible manner.

Federal courts have a duty to try to save, not destroy, democratically-developed legislation. ***Planned Parenthood Ass'n. Of Kansas City, Mo., Inc. v. Ashcroft,*** 462 U.S. 476, 493 (1983). In concluding that the Nebraska law encompasses not just partial-birth (or D&X) abortions, but the more common D&E procedure as well, the Eighth

Circuit failed to respect this rule in general and in particular the customary benefit of the doubt that the Court gives State and Federal Lawmakers.

First, the law is not an openly-worded Rorschach test. The plain terms of the statute regulate the D&X procedure and no other. The law identifies its single target by name – "partial-birth abortion" – using a phrase that every medical and legislative source to date has understood to refer solely to the D&X procedure. In conspicuous contrast, the D&E procedure is nowhere mentioned and nowhere banned. Making matters more clear, the law proceeds to define the banned procedure as an abortion in which one "partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." Neb. Rev. Stat. 28-326(9). Then, in an effort to ensure that the law *does not* cover the D&E procedure, the statute indicates that "partially delivers" means "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person . . . knows will kill the unborn child and does kill the unborn child." ***Id.***

Unlike the D&E procedure, in which the object is to dismember the unborn child, the thrust of the D&X procedure is to kill the child after almost complete delivery – in other words, to deliver the child (e.g., "delivers vaginally a living unborn child") before performing the suction procedure to the child's skull, which the individual "knows will kill" the unborn child and "does" in fact do so. A "living unborn child" simply is not "deliver[ed]" in the D&E dismemberment procedure, accidentally or otherwise, and thus is not covered by the ban. Nor can plaintiffs legitimately seize on the limiting language (a "substantial portion" of the child) to extend the law beyond its D&X mooring. A word is known by the "company it keeps," ***Gutierrez v. Ada,*** ___ U.S. ___, 120 S.Ct. 740, 744 (2000) (*quoting* ***Gustafson v. Alloyd Co.,*** 513 U.S.

561, 575 (1995), and the word "substantial," in context, cannot tenably refer to a dismemberment procedure.

Even if doubt remained regarding the scope of the regulation, the answer was not to invalidate the law in its entirety in this pre-implementation challenge. It was to consider whether other time-honored rules of construction – deference to administrative interpretations, legislative history, the doctrine of constitutional avoidance – clarify any such ambiguity. In point of fact, they do. The Attorney General, Nebraska's top legal official, has disclaimed any intent to construe the statute to apply to the D&E procedure. Just as the United States Department of Justice receives deference regarding its administrative interpretations of a federal statute, so it is appropriate here to defer to the State Attorney General regarding his limiting construction of a state statute. ***Arizonans for Official English,*** 520 U.S. 43 (1997). Likewise, legislative history and statutory purpose, both legitimate sources of legislative meaning under Nebraska law, make clear that the law applies only to the D&X procedure, and never was intended to apply to any other procedure. Lastly, the doctrine of constitutional avoidance demonstrates that this limiting construction of the statute is not only sanctioned by Nebraska law, but by principles of United States constitutional law.

Once it is established that the law does not cover the D&E procedure, it is clear that it does not constitute an undue burden on the right to decide whether to terminate a pregnancy. Both ***Planned Parenthood of Southeastern Pennsylvania v. Casey,*** 505 U.S. 833 (1992), and ***Roe v. Wade,*** 410 U.S. 113 (1973), make clear that a woman's right to choose an abortion is not absolute and that a woman is not "entitled to terminate her pregnancy . . . in whatever way . . . she . . . chooses." ***Roe,*** 410 U.S. at 153.

An abortion regulation that covers one "way" of performing an abortion, while leaving open other safe alternatives, does not constitute an undue burden by any relevant standard of review.

That leaves the Respondent's final argument – that the law imposes an undue burden because a partial-birth abortion may be necessary to preserve the health of the mother in some circumstances. Not so. The medical and legislative testimony made it plain that the partial-birth procedure is *never* medically necessary. Both the AMA and numerous doctors have attested to this fact, making a health exception superfluous and unnecessary. In any event, the Respondent's argument is premature as a matter of law in this pre-implementation challenge. Whether one looks to the "large fraction" test of ***Casey,*** or the "no set of circumstances" test of ***U.S. v. Salerno,*** 481 U.S. 739 (1987), the conclusion is the same: A law cannot be struck in all of its applications when no one alleges that even a small percentage of partial-birth abortions would implicate such a health exception.

III. ARGUMENT

A. INTRODUCTION AND OVERVIEW

The degree to which the various States comprising our federal union may regulate abortion practice has been a divisive and contentious issue for over twenty-five years. In 1992, this Court adopted what was thought to be somewhat of a middle ground between sanctioning abortion on demand and allowing total leeway for States to regulate abortion. The Court held that States could not impose an undue burden on the ability of a woman to decide whether to terminate her pregnancy prior to fetal viability. At the same time, the Court indicated that state regulations would be upheld "which in no real sense deprived the woman of the ultimate decision." ***Planned Parenthood of Southeastern Pennsylvania v. Casey,*** 505

U.S. 833, 875 (1992). The Court pointedly noted that the interests of the States in this area had not, theretofore, been receiving proper "acknowledgment and implementation." ***Casey,*** 505 U.S. at 871. In so doing, the Court affirmed the principle from ***Roe v. Wade*** that a woman's right to choose an abortion is not absolute, nor is she "entitled to terminate her pregnancy . . . in whatever way . . . she . . . chooses." ***Roe v. Wade,*** 410 U.S. 113, 153 (1973).

Despite the Court's statements in ***Casey,*** however, the lower federal courts have failed to show any increased recognition of the States' important interests. Recent legislative action by thirty States to ban a controversial and rare procedure known as partial-birth abortion has highlighted this situation, and has underscored the ultimate question: Did ***Casey*** mean what it says about the States' interests, or can there be no meaningful legislative regulation of abortion in the United States? If the decisions of the lower courts in this case are allowed to stand, there can be little doubt but that abortion is now permissible by virtually any and all means, and the States are powerless to legislate even the most modest restrictions. ***See Hope Clinic v. Ryan,*** 195 F.3d 857, 874 (7th Cir. 1999) (en banc) (noting that acceptance of the position now advocated by the Respondent herein "would amount to a rule that anything goes").

In ***Casey,*** the Court held that the legal framework utilized in much of the prior abortion case law did "not fulfill ***Roe's*** own promise that the State has an interest in protecting fetal life or potential life." ***Casey,*** 505 U.S. at 876. Likewise, the legal framework utilized by the lower courts in this case does not fulfill ***Casey's*** promise that "not all regulations must be deemed unwarranted," ***id.,*** or ***Roe***'s assurance that there is no constitutional right to terminate a pregnancy "in whatever way" one chooses. ***Roe,*** 410 U.S. at 153.

The State of Nebraska does not believe the Court in ***Roe*** or ***Casey*** ever envisioned sanctioning the destruction

of human infants delivered all but inches outside the womb. A large and politically diverse majority of legislators in at least thirty States apparently do not believe this was the Court's intent either. Nonetheless, this case presents the Court with the question of the validity of state bans on this once unthinkable practice.

B. NEBRASKA'S PARTIAL-BIRTH ABORTION STATUTE DOES NOT ENCOMPASS THE MORE COMMON D&E ABORTION PROCEDURE.

The key legal determination made by the Eighth Circuit in this case concerned the scope of Nebraska's partial-birth abortion statute. ***Carhart v. Stenberg,*** 192 F.3d 1142, 1145 (8th Cir. 1999) (Pet.App. 4-5). The court expressly found that the "medical description [of the D&X abortion procedure] is within the definition of partial-birth abortion contained in the Nebraska Statute. . . . " ***Id.*** However, the panel concluded that Nebraska's statute bans not only the D&X procedure, but also the more common D&E (dismemberment) abortion procedure. ***Id.***[2]

This overly broad reading of the statute was erroneous for a number of reasons. First of all, no such application of the statute to the D&E procedure has ever been made or even threatened. Second, the Nebraska Attorney General has expressly disavowed any such construction of the statute or any intent to apply the statute to the D&E, or any other procedure except the D&X. Third, the plain language of the statute does not support such a broad reading. Fourth, the legislative intent behind the statute was clearly to prohibit only the D&X

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[2] The Dilation and Evacuation (D&E) abortion procedure is used in the 13th and subsequent weeks of gestation. It involves extraction of the unborn child from the uterus in pieces through the use of forceps. (Supp. App. 100-101).

procedure. Fifth, important principles of federalism as reflected in fundamental rules of statutory construction dictate a construction of the statute limiting its applicability to the D&X procedure. The following sections will discuss each of these five reasons why Nebraska's statute does not encompass the D&E procedure.

1. No Application of the Statute to the D&E Procedure Has Ever Been Made or Threatened.

Three days after Nebraska's partial-birth abortion statute was signed into law, the Respondent filed suit in federal district court seeking its facial invalidation (J.A. 1); (Eighth Cir. App. 1-19). The statute has never been applied to prohibit D&E abortions; nor has such application ever been threatened.

2. The Chief Law Officer of the State of Nebraska Has Expressly Disavowed Any Intent to Apply the Statute to D&E Abortions.

The Nebraska Attorney General, the chief law officer of the State, has interpreted the statute as encompassing only the D&X procedure, and excluding the D&E procedure. ***Carhart v. Stenberg,*** 192 F.3d at 1150 ("The State argues that LB 23's ban on partial-birth abortion prohibits only the D&X procedure, and not the D&E.") (Pet.App. 16). (***See also*** R.Tr. 28) (Eighth Cir. App. 296) (statement by district court that "it's the State's position that D&E is not prohibited; D&X is prohibited"). Although the Attorney General's construction is not equivalent to that of the Nebraska Supreme Court, it is entitled to deference. This is especially true where a statute is challenged in federal court prior to its application and prior to being interpreted by a state court. ***See Broadrick v. Oklahoma,*** 413

U.S. 601, 618 (1973). ***See also Arizonans for Official English v. Arizona,*** 520 U.S. 43 (1997).

In ***Hope Clinic v. Ryan*** the court noted, "The Attorneys General of Illinois and Wisconsin, the principal defendants, tell us that their statutes are concerned only with the D&X procedure and will be enforced only against its use. That assurance might be enough by itself, in the absence of any contrary indication from the State judiciary, to resolve immediate vagueness concerns." ***Hope Clinic,*** 195 F.3d at 865. In construing the statute as covering only the D&X the court stated, "We believe that state courts are entitled to accept the view of both State's Attorneys General that their laws do not forbid, or even affect, [the D&E] procedure." ***Id.*** at 871. This Court should afford similar deference to the Attorney General's construction of the statute in the present case.

3. The Plain Language of the Statute Does Not Encompass the D&E Procedure.

The Respondent alleges that Nebraska's statute bans the D&E method of abortion because a fetal part could potentially enter the vagina either intentionally or inadvertently during the "disjoining" of the unborn child or when it is brought out in parts during a D&E abortion. According to the Respondent, such an occurrence would fall within the definition of the banned procedure. However, as discussed in detail below, the language of the statute read in its plain, ordinary, and popular sense does not encompass the D&E procedure.

The first sentence of Neb. Rev. Stat. § 28-326(9) provides: **"Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."** The second sentence adds a scienter requirement and defines "partially delivers" as delivering into the vagina

the entire unborn child or a substantial portion thereof. The second sentence also specifies that the purpose of such partial delivery is the subsequent performance of a procedure that the abortionist knows will kill the child and does kill the child: **"The term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."** ***Id.*** Therefore, by its express terms, the only conduct that violates the statute is "deliberately and intentionally delivering into the vagina a living unborn child or a substantial portion thereof, for the purpose of performing a procedure that . . . will kill the unborn child and does kill the unborn child."

The elements of the banned method of abortion include the deliberate and intentional 1) partial delivery of a living unborn child vaginally for the purpose of performing a separate death-causing procedure, 2) killing the unborn child by the separate procedure after its partial-delivery and 3) completing the delivery. No method of abortion except the D&X procedure meets these statutory criteria, and thus no other method of abortion is banned by the statute. ***See Richmond Medical Center For Women v. Gilmore,*** 144 F.3d 326, 328-332 (4th Cir. 1998).

The Eighth Circuit, at the urging of the Respondent, focused its analysis on isolated phrases or words in the statute to the exclusion of other language and the statute as a whole. However, when all the statute's language is given effect and read in context, the Court need not even resort to the doctrine of constitutional avoidance to uphold the law. Under Nebraska law, "[i]n construing a statute, a court must determine and *give effect to the purpose and intent of the Legislature as ascertained* from the

entire language of the statute considered in its *plain, ordinary, and popular sense.*" ***Stenberg v. Moore,*** 602 N.W.2d 465, 472 (Neb. 1999) (emphasis added). As explained in more detail below, the language of the statute "read in its plain, ordinary and popular sense" reveals that D&E abortions are not covered by its terms. Nebraska's statute does not ban any method of abortion except the D&X procedure.

a. The expressly stated subject of the statute, "partial-birth abortion," cannot be read as referring to the D&E procedure.

The first sentence of the statute begins by stating its subject: "*partial-birth* abortion." Neb. Rev. Stat. § 28-326(9) ("Partial-birth abortion means an abortion procedure. . . . "). Somehow the statute's first word, "partial-birth", was ignored by the courts below, which construed the statute as covering dismemberment (D&E) abortions. A "birth" (partial or otherwise) does not entail just moving human extremities, such as an arm or a leg, beyond the cervix. As the statute's second sentence clearly states, the "partial-birth" procedure involves an unborn child being *delivered* ("delivers vaginally a living unborn child"). Any reading of the term "partial-birth" in its plain, ordinary and popular sense would necessarily exclude all recognized abortion procedures except the D&X procedure. ***See Hope Clinic v. Ryan,*** 195 F.3d at 865 ("Both medical and popular literature equate 'partial-birth abortion' (the statutory term) with the D&X procedure.").

The phrase "partial-birth abortion" has never been used in any context (legal, medical or popular usage) to refer to the D&E procedure. No reasonable person would read "partial-birth" as referring to a dismemberment abortion. Ironically, the Eighth Circuit has specifically acknowledged that *"The term 'partial-birth abortion' . . . is* **commonly understood** to refer to a **particular procedure**

known as intact dilation and extraction (D&X)." ***Little Rock Family Planning Services v. Jegley,*** 192 F.3d 794, 795 (8th Cir. 1999) (emphasis added). Whereas Nebraska law requires that a court give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, ***Stenberg,*** 602 N.W.2d at 472, all terms and provisions of the statute in question must be read in light of its expressly stated purpose – the banning of *"partial-birth"* abortion.

b. The phrase "partially delivers vaginally a living unborn child" does not, by its terms, refer to a D&E abortion.

The statute provides that "Partial-birth abortion means an abortion procedure in which the person performing the abortion partially *delivers* vaginally a *living unborn child* before killing the unborn child and *completing the delivery.*" Neb. Rev. Stat. § 28-326(9) (emphasis added). The words "delivery" and "delivers," in their plain, ordinary, and popular sense, refer to extraction of a baby, not piece by piece dismemberment. Likewise, "living unborn child" reasonably refers to a baby, not pieces thereof. Thus, the statute's terms do not reasonably refer to dismemberment (D&E) abortions, and the Court must give effect to the purpose and intent of the Nebraska Legislature as evidenced by these terms in their ordinary and popular sense.

c. The statute cannot be read as including D&E procedures since it distinguishes between the overall "abortion procedure" itself and the separate "procedure" used to kill the unborn child.

Nebraska's statute initially refers to partial-birth abortion as "an abortion procedure." Neb. Rev. Stat.

§ 28-326(9) (first sentence). It then further defines this overall procedure by reference to a series of elements, one of which is a separate and distinct "procedure" used to kill the child ***Id.*** (second sentence). Specifically, the statute says the intentional delivery of the living unborn child into the vagina is "for the *purpose* of performing *a procedure* that the person performing *such procedure knows will kill* the unborn child. . . . " ***Id.*** (emphasis added). The statute further indicates the separate and distinct nature of the death-causing procedure in that it specifically refers to "completing delivery" *after* performance of the death-causing procedure. Neb. Rev. Stat. § 28- 326(9) (first sentence). Thus, a distinguishing feature of the statute is its focus on the place where the killing act occurs.

Against this statutory backdrop, the Respondent's assertion that the statute encompasses the accidental or intentional entry of a body part into the vagina during a D&E (dismemberment) abortion is an untenable reading of the statute's terms. In a D&E procedure, the intent is never to deliver the unborn child into the vagina so that it may then be killed. Furthermore, in a D&E abortion there is no distinction between the overall "abortion procedure" and the "procedure" used to kill the child. As shown above, Nebraska's partial-birth abortion statute clearly does make such a distinction. The delivery of the child into the vagina "for the purpose of performing" a separate and certain death-causing procedure distinguishes the partial-birth abortion procedure from all other abortion procedures. The testimony of the Respondent himself confirms this fact. Dr. Carhart testified that in a D&E abortion the unborn child will continue living after it has been partially dismembered, due in part to the continuing blood supply from the placenta to the child. (J.A. 64) ("[W]e can still see fetal heart activity with extensive parts of the fetus removed."). Consequently, he testified that he *does not know when death will occur* in a

D&E. (J.A. 62-64). In contrast, the statute says the separate death-causing procedure in a partial-birth abortion is one which "the person performing such procedure *knows will kill* the unborn child." After initially evading the question, Dr. Carhart acknowledged that brain function ceases quickly when the brain suctioning is done in a D&X. (J.A. 60). Thus, the uncertainty as to when death will occur in a D&E procedure clearly distinguishes the D&E procedure from the partial-birth abortion/D&X procedure under the terms of the statute.[3] The Respondent may argue that the "removal of the fetal extremities" (mechanical removal of arms and legs) in a D&E abortion is "a procedure" that causes death and, therefore, is covered by the statute. However, this interpretation would require the Court to equate multiple, random acts of dismemberment (which may or may not, by themselves, kill the child) with "a procedure that the person performing such procedure *knows will kill* the unborn child *and does kill* the unborn child." Neb. Rev. Stat. § 326(9) (emphasis added). Such an interpretation would be clearly inconsistent with the plain language of the statute.[4]

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[3] In ***Little Rock Family Planning Services v. Jegley,*** 192 F.3d 794 (8th Cir. 1999) the court acknowledged that in a D&E procedure where an arm or leg are removed from the child's body "[t]he rest of the fetus remains in the uterus while dismemberment occurs, and is often *still living*." ***Id.*** at 797 (emphasis added). The court's acknowledgment that the child is often still living after a body part or parts have been severed in a D&E is highly significant since the express language of the Nebraska statute clearly contemplates partial delivery followed by the doctor "performing a procedure that the person performing such procedure *knows will kill* the unborn child *and does kill* the unborn child." This language distinguishes a D&X procedure from a D&E procedure and cannot be ignored.

[4] The Eighth Circuit, in its analysis of this language, stated, "A physician who brings an arm or a leg into the vagina ***as part***

d. The phrase "substantial portion," when read in context, refers to a partially delivered child and not to a dismemberment procedure.

The statutory language that is the focus of the Respondent's challenge is the phrase "substantial portion." The analysis of this challenged language is set forth last since under Nebraska law it must be read together with, and in the context of, the preceding language which rules out the D&E procedure from the statute's coverage.[5]

The Respondent deliberately isolates the phrase from its context, and then alleges that it encompasses the D&E procedure.[6] When removed from its context, even the State's witnesses candidly acknowledged the inherent "germs of uncertainty" that this Court has said are inherent in any word. ***Broadrick v. Oklahoma,*** 413 U.S. at 608. However, in the context of the statutory terms discussed above, the phrase "substantial portion" logically refers only to a substantial portion of the entire body of the

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of the D&E procedure therefore violates the statute." ***Carhart,*** 192 F.3d at 1150 (emphasis added). Thus, the circuit court expressly equated the separate death-causing procedure referenced in the statute with "part of the D&E procedure." This construction ignores the plain language of the statute which references "completing the delivery" as a step of the banned procedure occurring subsequent to "killing the unborn child" by "a procedure that the person . . . knows will kill . . . and does kill the unborn child." Neb. Rev. Stat. § 28-326(9).

[5] In contrast, the Eighth Circuit began its analysis by examining this phrase, and it did so in isolation from its context. ***Carhart,*** 192 F.3d at 1150.

[6] (***See*** J.A. 37) ("I want to focus your attention on the term substantial portion."). The court's analysis in ***Richmond Medical Center For Women v. Gilmore,*** 144 F.3d 326 (4th Cir. 1998), exposes the Respondent's litigation strategy of isolating the phrase "substantial portion" from its context.

partially delivered living child – again, due to the use of such modifying phrases as "intentionally delivering" a "living unborn child."

Due to the scienter provision contained in the same sentence of the statute, as well as the other terms in the statute which distinguish the banned procedure from the D&E (or any other abortion procedure), the meaning of "substantial portion" is *never an issue* for a physician not intentionally performing a D&X procedure. In other words, other provisions of the statute eliminate the D&E procedure from consideration before this phrase ever becomes an issue. This is not to say the phrase is meaningless. To constitute an element of the banned procedure, according to the terms of the statute, the delivery of the unborn child from the womb into the vaginal canal can be either complete ("delivering into the vagina a living unborn child") or "a substantial portion thereof." Thus, the phrase is needed to prevent avoidance of the statute on the basis the entire child must be delivered into the vagina.

When read in its context the phrase describes the D&X procedure, where all but the head of the child is delivered outside the uterus. As Dr. Boehm testified, in a partial-birth abortion "[a] significant portion of the fetus is outside of the vagina. Otherwise, it's difficult . . . to put a . . . trocar through the base of the skull underneath the cervical realm." (J.A. 664); (***See also*** J.A. 663). In other words, if the child's body were not delivered through the cervical os at least up to the head, it would be difficult, if not impossible, to pierce the child's skull. Consequently, the Nebraska Attorney General interprets the phrase "substantial portion," when read in the context of the overall statute, as meaning the child up to the head.[7]

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[7] The legislative history of this language shows that this was the intended meaning. (Eighth Cir. App. 1640) ("The abortionist then delivers the baby's entire body except the head.") (opening statement by sponsoring senator). The "substantial portion" language was specifically added to the statute to further distinguish the D&X procedure from dismemberment abortions in order to assure support for the statute from the AMA. (Eighth Cir. App. 1779). This overriding fact dispels any confusion resulting from attempts by one opponent during floor debate to isolate the term from the rest of the statute and thereby lead proponents down rabbit trails, debating how much of an unborn child is "substantial." There is no evidence of any abortion technique in which a death-causing procedure is performed, under the specifications of the statute, where the child is delivered less than up to the head.

The Respondent's alleged confusion concerning the meaning of "substantial portion" is self-induced.[8] As one federal court noted, the "Plaintiffs' alleged confusion concerning the meaning of [Wisconsin's partial-birth abortion statute] is a demon of their own creation." ***Planned Parenthood of Wisconsin v. Doyle***, 9 F. Supp.2d 1033, 1041 (W.D. Wis. 1998) (subsequent history omitted). ***See also Gilmore***, 144 F.3d 326. In sum, the Respondent's focus on, and objection to, the "substantial portion" language in the statute is a litigation tactic designed to play upon the inherent "vagueness" one can find in any common term when it is deliberately isolated from its context. ***Broadrick***, 413 U.S. at 608. As discussed above, other provisions in Nebraska's statute rule out D&E abortions, thus making the meaning of the phrase "substantial portion" irrelevant to any procedure other than a D&X.

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[8] The Respondent testified that, in his view, extraction of the umbilical cord could fall within the conduct prohibited by the statute. (J.A. 37). This absurd interpretation demonstrates the strained nature of the Respondent's construction.

4. The Expressly Stated Purpose for Enactment of the Statute by the Nebraska Legislature Confirms its Applicability Only to the D&X Procedure.

The State believes the language of the statute, read in its plain, ordinary, and popular sense, excludes the D&E procedure. However, in the event the Court finds any term in the statute to be ambiguous, even when read in the context of the entire statute, the next avenue for ascertaining the law's purpose and intent is to examine its legislative history.[9] ***Pump & Pantry, Inc. v. City of Grand Island,*** 444 N.W.2d 312, 316 (Neb. 1989). The legislative intent of Nebraska's statute is clear. The first words spoken by the sponsoring senator during legislative consideration of the bill were as follows:

> My personal priority bill, LB 23, would prohibit the use of ***partial-birth abortion*** procedure, ***also known as dilation and extraction,*** in the state of Nebraska.

Floor debate on LB 23, April 11, 1997, p. 3955 (emphasis added) (Eighth Cir. App. 1639). Thus, it was clear from the very beginning that the statute's intent was to ban the D&X procedure.

In addition, the legislative history of the amendment which added the "substantial portion" language (the phrase which is the focus of the Respondent's challenge) shows that this provision was actually added to the statute *for the purpose of clarifying that the D&E procedure was not covered by the bill.* During floor debate on May 20, 1997, the bill's sponsor reported that "The changed language is in the bill now: [it] 'makes it *clear beyond any*

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[9] The full legislative history of the Act is found in the Eighth Circuit Appendix, Vol. VII, pp. 1627-2026. *See* S.Ct. Rule 26(2). The State chose not to burden the already large Joint Appendix with its inclusion. Only portions selected by the Respondent appear in the Joint Appendix.

question that the accepted abortion procedure known as dilation and evacuation, also referred to as **D&E, is not covered** by the bill. . . . " (Eighth Cir. App. 1779) (Statement by Senator Maurstad, quoting a statement from the American Medical Association (AMA) in support of a ban on partial-birth abortion using the same language) (emphasis added). Similarly, pro-choice Senator Pam Brown stated that "in the opinion of the AMA the bill has no impact on a woman's right to choose an abortion, consistent with ***Roe v. Wade*** . . . other abortion procedures . . . remain fully available." (Eighth Cir. App. 1805). The reason the bill's sponsor, as well as pro-choice supporters, were quoting the AMA's statement was that the congressional bill upon which Nebraska's statute was patterned had been amended to assure the AMA that the D&E procedure was not covered by the statute.

The Respondent asks the Court to believe that the legislatures of thirty States (including many or most of the pro-choice legislators in those States) have conspired to enact a ban on virtually all abortion procedures. Alternatively, he would ask the Court to believe these thirty legislatures were all ignorant of what they were legislating. The Petitioners believe these legislatures, and particularly the Nebraska Legislature, knew exactly what they were doing – banning the D&X procedure.

5. The Doctrine of Constitutional Avoidance, As Well As Principles of Federalism and Administrative Deference Require the Statute to Be Read as Not Covering D&E Abortions.

Even if the Court should deem it necessary to resort to rules of statutory interpretation beyond the plain terms of the statute and the legislative history, the result is the same. As discussed below, the doctrines of constitutional avoidance and administrative deference require the statute to be read as not encompassing the D&E procedure.

a. Nebraska's statute must be interpreted according to fundamental rules of construction which afford proper deference to state legislative enactments.

Nebraska's statute must be interpreted according to fundamental rules of construction. These rules reflect basic tenents of federalism, and they therefore require proper deference to state legislative enactments.

i. A federal court is obliged to presume that the intent of the statute is within constitutional bounds and to favor an interpretation of the statute that renders it constitutional.

This Court has long held that a federal court is obliged to presume a legislative intent to act within constitutional bounds, and to favor an interpretation of a statute that renders it constitutional. ***De Bartolo Corp. v. Florida Gulf Coast Building, and Construction Trades Council,*** 485 U.S. 568, 575 (1988) (*quoting* ***Hooper v. California,*** 155 U.S. 648, 657 (1895)).

In ***Webster v. Reproductive Health Services,*** 492 U.S. 490 (1989), the Court considered the constitutionality of a Missouri statute that required viability testing "[b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age. . . . " ***Id.*** at 513. Several Justices criticized the Eighth Circuit panel (which had declared the statute unconstitutional) for its interpretation of the statute which "runs 'afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.' " ***Id.*** at 514 (quoting ***Frisby v. Schultz,*** 487 U.S. 474, 483 (1988)). The Justices stated the panel's reading of the statute "violates well-accepted canons of statutory interpretation. . . . " ***Id.*** at 515 (noting that the law favors saving constructions of challenged

statutes). In the present case, the Eighth Circuit again failed to follow this basic rule of statutory construction.[10]

ii. The Court must ascertain whether a construction of the statute is fairly possible by which constitutional doubts may be avoided and must accord the statute that meaning.

Under the doctrine of constitutional avoidance, the test is not whether a statute could possibly be construed in an unconstitutional manner, but whether the law is susceptible of a reasonable interpretation which supports its constitutionality. ***United States v. National Dairy Products Corp.,*** 372 U.S. 29, 32 (1963). The Court has held that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the

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[10] The Eighth Circuit's adoption of an unconstitutional construction of Nebraska's partial-birth abortion statute was particularly inappropriate given the availability under Nebraska law of a mechanism for obtaining a definitive interpretation of the statute from the Nebraska Supreme Court. Neb. Rev. Stat. § 24-219. The State requested the district court to abstain in light of the fact the statute had not been construed by the Nebraska Supreme Court. (Eighth Cir. App. 38). However, the court did not. Given the availability of a reasonable constitutional construction of the statute, the State does not believe that certification of any questions is necessary. Nevertheless, if following briefing and oral argument, this Court has any unresolved questions regarding the proper interpretation of the scope or application of the statute, the answers to which could affect the constitutionality of the statute, then the Court could certify those questions to the Nebraska Supreme Court for prompt resolution. Since the certification statute was enacted, the Nebraska Supreme Court has answered almost three dozen questions certified by federal courts, over half of which arose in the context of a single abortion case. ***See Orr v. Knowles,*** 337 N.W.2d 699 (Neb. 1983).

other valid, our plain duty is to adopt that which will save the Act." *Id.* Similarly, this Court has held that, "It is a 'cardinal principal' that [federal courts] are to ascertain whether a construction of the statute involved is 'fairly possible' by which such constitutional doubts may be avoided." *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974).

When reviewing a state legislative enactment pertaining to abortion, a federal court is not to merely accept the interpretation proffered by the party seeking to invalidate the statute. *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 496 (1983). The Court has held that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991).

These rules of construction/federalism are particularly important when considering partial-birth abortion statutes. *See Hope Clinic*, 195 F.3d 857; *Gilmore*, 144 F.3d at 332; *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997) (Boggs, dissenting) ("The Supreme Court has reminded us time and again that, rather than reaching out to strike down statutes that are arguably unconstitutional, the federal courts are to interpret statutes so as to avoid difficult constitutional questions where possible.").

iii. Nebraska's statute may be construed in a constitutional manner.

When the above rules of construction are applied, Nebraska's statute can easily be construed as banning only the D&X procedure. As described in detail above, a construction of Nebraska's partial-birth abortion statute is fairly possible by which its application is limited to the D&X. An analysis of this same issue with regard to a

virtually identical statute[11] was set forth in *Richmond Medical Center for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998). *Accord Hope Clinic*, 195 F.3d 857. These opinions provide sufficient grounds to reverse the decision of the Eighth Circuit, as they clearly demonstrate that a construction of the statute is fairly possible by which constitutional doubts may be avoided. *Webster*, 492 U.S. at 514; *Ashcroft*, 462 U.S. at 493.

Further aiding a constitutional construction of Nebraska's statute is its clear scienter provision. *See Hope Clinic*, 195 F.3d at 867. Unlike some partial-birth abortion statutes, Nebraska's statute has an express intent or scienter requirement. *Compare Evans v. Kelley*, 977 F. Supp. 1283, 1308-1309, 1311 (E.D. Mich. 1997). In *Evans*, the court found that the Michigan statutes' "lack of an explicit intent requirement . . . makes the statute particularly susceptible to ambiguous interpretation and unpredictable enforcement." *Id.* at 1308.[12] Conversely, in *Doyle*, the court noted, in its analysis of Wisconsin's partial-birth abortion statute, that "A scienter requirement significantly diminishes a statute's susceptibility to discriminatory enforcement." *Doyle*, 9 F. Supp.2d at

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[11] The district court in the present case specifically acknowledged that "Virginia's partial birth abortion law is nearly identical to Nebraska's." *Carhart*, 11 F. Supp.2d at 1129. (Supp.App. 80).

[12] It is noteworthy that despite its invalidation of the Michigan statute, the *Evans* court stated that "the Legislature can, consistent with *Casey* and other Supreme Court precedent, tailor an abortion regulation that would avoid the pitfalls of vagueness and overbreadth and pass constitutional muster." *Evans*, 977 F. Supp. at 1319 n.38. ***The court then discussed, at considerable length, an example of more carefully and precisely drawn legislation: the precise language now contained in Nebraska's statute. Id.*** at 1311 n.29, 1319-1320 n.38.

1040.[13] The court specifically held that "The scienter requirement in Wisconsin's law protects physicians against inadvertent violations of the law." *Id.* at 1043. ***See also Gilmore***, 144 F.3d at 328-332 (detailed analysis of the significance of the scienter requirements of a partial-birth abortion statute nearly identical to Nebraska's statute).

b. A variation of *Chevron* deference applies to require the statute be read as not covering D&E abortions.

Federal courts defer to an interpretation of a federal law offered by the federal official responsible for administering it, particularly with respect to those interpretations that are consistent with the rules of statutory construction. ***Chevron v. Natural Resources Defense Council***, 467 U.S. 837, 844 (1984). The federal government also receives deference from federal courts regarding interpretations of statutes offered by the Department of Justice and other federal agencies. **See *Olmstead v. Zimring***, 527 U.S. 581, 119 S.Ct. 2176, 2186 (1999). The same rule should apply to the States, and in view of separation of powers and federalism concerns, should apply even more vigorously to the States. ***See Arizonans for Official English***, 520 U.S. 43 (1997). As discussed ***infra*** at 12-13, Nebraska's Attorney General has construed the challenged statute as encompassing only the D&X procedure. Consequently, Nebraska's statute must be read as not covering D&E abortions.

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[13] This decision was reversed by ***Planned Parenthood of Wisconsin v. Doyle***, 162 F.3d 463 (7th Cir. 1998), but its analysis was eventually vindicated by ***Hope Clinic v. Ryan***, 195 F.3d 857 (7th Cir. 1999) (en banc).

C. NEBRASKA'S BAN ON PARTIAL-BIRTH ABORTION DOES NOT PLACE A SUBSTANTIAL OBSTACLE IN THE PATH OF A WOMAN SEEKING TO TERMINATE HER PREGNANCY AND THEREFORE DOES NOT CREATE AN UNDUE BURDEN.

Properly construed as encompassing only the D&X procedure, Nebraska's partial-birth abortion statute does not place a substantial obstacle in the path of a woman seeking to terminate her pregnancy, and therefore does not create an undue burden. As discussed in detail below, the Court's decisions in ***Roe v. Wade*** and ***Casey*** leave ample room for States to ban one type of abortion procedure where other safe alternatives remain available. Furthermore, neither ***Roe*** nor ***Casey*** contemplated the killing of infants while delivered mostly outside of the womb.

The central holding of ***Roe v. Wade***, as affirmed in ***Casey***, was predicated on certain "factual underpinnings." ***Casey***, 505 U.S. at 860. Among these underpinnings was the public's understanding of what constituted an "abortion." As the controlling opinion in ***Casey*** noted, "abortion . . . is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for . . . society which must confront the knowledge that these procedures exist. . . . " ***Casey***, 505 U.S. at 852.

The Court noted that "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations. . . . " ***Casey***, 505 U.S. at 864. However, the Court concluded that "neither the factual underpinnings of ***Roe's*** central holding nor our understanding of it has changed. . . . " ***Id.*** The present case, however, does involve a change in a factual underpinning, and is before the Court precisely because the public's understanding of what constitutes a legal abortion simply does not include

the partial-birth abortion/D&X procedure. This is evidenced, in part, by the overwhelming legislative sentiment to ban the procedure in at least thirty States and Congress. In short, the public does not believe the partial-birth abortion/D&X procedure falls within the realm of conduct protected by ***Roe*** and ***Casey,*** and a determination to the contrary would, in the Petitioners' view, not be accepted as "a common mandate rooted in the Constitution.", ***id.*** at 867, due to the scope of protected activity having "changed so fundamentally." ***Id.*** at 868.

1. The Absence of a Health Exception in Nebraska's Statute Does Not Create an Undue Burden Since No Health Exception Is Needed Where Safe Alternative Procedures Are Available.

Banning the D&X abortion procedure does not keep any woman from obtaining a safe abortion. Nebraska's statute contains an exception allowing use of the partial-birth abortion procedure if ever necessary to save the life of the mother. Neb. Rev. Stat. § 28-328(1). However, the Nebraska Legislature omitted a general "health" exception as being unnecessary. As discussed in detail in the sections below, partial-birth abortion is not medically necessary, and safe alternative methods of abortion are available. Neither the Respondent nor any other plaintiff in any state has identified any articulable, concrete category of situations in which the D&X procedure is even the best option. ***See Hope Clinic,*** 195 F.3d at 872 (noting district court finding that the D&X "is never necessary" from the perspective of the woman's health, and that ACOG could "not identify any concrete circumstances" under which the D&X is the best option). Since the statute does not affect the "right to choose" an abortion (since other safe procedures remain available) the right itself

still remains protected by a health exception. ***See Hope Clinic,*** 195 F.3d at 871 (health exception not necessary when the procedure lacks demonstrable health benefits and where state law offers safe alternative abortion procedures). Thus, the absence of a health exception in the statute does not create a substantial obstacle to the right to choose to terminate a pregnancy.[14]

Just as important, no evidence supports the notion that a health exception would be necessary in all circumstances, ***U.S. v. Salerno,*** 481 U.S. 739 (1987), or even in a large fraction of circumstances (***Casey***).[15] ***See Hope Clinic,*** 195 F.3d at 874 ("even for the class of women who seek late-second-trimester abortions, there is always one or more other safe methods of abortion in addition to D&X"). That alone dooms the Respondent's challenge.

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[14] The alternative is not consistent with ***Casey***. As the Seventh Circuit stated, "A requirement of a case-by-case 'health exception' to every statute concerning abortion would amount to a rule that no state may regulate any abortion procedure." ***Hope Clinic,*** 195 F.3d at 973.

[15] The relevant class under the large fraction rule cannot consist of one hypothetical woman as the district court below seemed to conclude. ***See Hope Clinic,*** 195 F.3d at 874 (rejecting the relevant class formulation utilized by the district court herein). Such an application of the large fraction rule would turn ***Salerno*** on its head. Furthermore, such a test would effectively eliminate the distinction between a facial and an as-applied challenge. The two would be merged into one nearly impossible test under which any statute would be one doctor's opinion away from invalidation.

2. The Effect Of Nebraska's Statute Is To Ban One Unnecessary and Rare Procedure, And It Does Not Place A Substantial Obstacle In The Path Of A Woman Seeking To Terminate Her Pregnancy.

a. The partial-birth abortion/D&X procedure is rare and unnecessary.

Partial-birth/D&X abortion is a relatively little-used procedure that is performed only by a handful of doctors. Dr. Henshaw, the Respondent's own expert, testified that "to my knowledge, there are only a few doctors nationally who do large numbers of D&X abortions." (J.A. 27-28). Out of approximately sixty physician plaintiffs in partial-birth abortion cases nationwide only two doctors other than the Respondent acknowledged using the D&X procedure, one of which testified he did only 2-3 a year. *See* Brief of Amicus Curiae Family First. Even for the few doctors who use the procedure, it is of limited application. The Respondent acknowledges the procedure is not practical prior to 16 weeks, and is not used by him after 19 weeks (since he kills unborn children in utero by injection prior to extraction after that time). In the time between, the procedure is unpredictable, and intact extraction fails, according to the Respondent, 90-95% of the time. (J.A. 61).[16]

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[16] The D&X procedure is typically used late in the second trimester, between the twentieth and twenty-fourth weeks of pregnancy, inclusive. ***Voinovich***, 130 F.3d at 198. In ***Planned Parenthood of Southern Arizona, Inc. v. Woods***, 982 F. Supp. 1369 (D.Ariz. 1997), the only reported testimony on the timing of the procedure was that it was performed from 22 to 24 weeks. ***Id.*** at 1375. This time frame is consistent with testimony before Congress. ***See*** Partial-Birth Abortion Ban Act of 1997, H.Rep. 105-24, March 14, 1997 at 4 ("The partial-birth abortion procedure is performed from around 20 weeks to full term"). In fact, "Dr. Haskell claims to have developed the method for use

The partial-birth abortion/D&X procedure is an unnecessary and little used procedure which the elected representatives of the people of the State of Nebraska have determined to be outside the scope of accepted medical practice.

b. The State may ban a particular abortion procedure where there are safe alternatives available.

Contrary to the position advocated by the Respondent, there are constitutionally permissible limits on what procedures may be used to terminate a pregnancy. In ***Roe v. Wade***, the Court stated that "appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, *in whatever way*, and for whatever reason she alone chooses. *With this we do not agree.*" ***Roe***, 410 U.S. at 153 (emphasis added).

The most basic limitation stems from the definition of abortion itself. An abortion is the intentional premature termination of a pregnancy. Neb. Rev. Stat. § 28-326 (1995).[17] The intentional killing of an infant (whether

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at twenty weeks and beyond. . . . " Partial-Birth Abortion Ban Act of 1995, H.R. 1833, Hearing Before the Committee on the Judiciary of the Senate, November 17, 1995, p. 347.

Dr. Carhart admits that he can and does attempt to induce fetal death by injection in utero 48 to 72 hours before beginning abortion procedures after the 20th week of gestation. ***Carhart v. Stenberg***, 972 F. Supp. at 514. (Supp.App. 18). Furthermore, he admits there is a medical benefit to the mother in doing so. (J.A. 65). The Respondent testified that, contrary to other practitioners, he "attempts" to perform the D&X procedure at 16 weeks (J.A. 61), even though he admits it almost always fails until much later (J.A. 61).

[17] Pregnancy occurs "within the uterus." ***McNill v. New York City Dept. of Corrections***, 950 F. Supp. 564, 569 (S.D.NY.

viable or not) after live delivery is not an abortion, but rather homicide.[18] Consequently, there are limits on what medical procedures may be used to perform an "abortion."[19]

With this foundation, the key question in this case is "under what circumstances may a State ban a particular abortion procedure without creating an undue burden?" As discussed in detail above, ***Casey*** protects the right to choose whether to terminate a pregnancy. It does not guarantee a right to an abortion by any or all means. Only where a substantial obstacle is imposed on the right to choose *whether* to abort is an undue burden created. Thus, where a State attempts to ban a particular abortion procedure the question presented under the undue burden analysis of ***Casey*** is whether there are safe alternative procedures available to women seeking abortions.[20]

1996). Pregnancy differs from parturition or childbirth. ***See, e.g., Kirkhuff v. Nimmo,*** 683 F.2d 544, 549 (D.C. Cir. 1982). During the partial-birth abortion procedure the child is three-fourths outside the uterus.

As discussed in this section Nebraska's statute does not create an undue burden under the ***Casey*** test. Alternatively, it may also be upheld under a balancing test applicable to partially-born children since ***Roe v. Wade*** and ***Casey*** dealt only with the "unborn." ***See*** Brief of Amicus Curiae National Right to Life Committee.

[18] ***See, e.g.,*** Neb. Rev. Stat. § 28-302(2) (defining "person, when referring to the victim of a homicide" as "a human being who had been born and was alive at the time of the homicidal act."); ***Showery v. Texas,*** 690 S.W.2d 689 (Tex.App. 1985).

[19] For example, if an abortion procedure results in a live birth, the abortionist may not then kill the child as part of his "procedure." ***See, e.g.,*** Neb. Rev. Stat. § 28-331 (requiring preservation of the life of a child born alive as the result of an abortion).

[20] This framing of the issue is consistent with ***Mazurek v. Armstrong,*** 520 U.S. 968 (1997), in which the Court upheld the

c. Safe alternatives to partial-birth abortion/D&X are available.

According to the American Medical Association, D&X abortion "is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." ***Voinovich,*** 130 F.3d at 214 (Boggs, dissenting) (quoting AMA position statement). ***See Hope Clinic,*** 195 F.3d at 872 ("there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion.") (quoting AMA Policy H-5.982). Even the inventor of the procedure says it is never medically necessary. ***Planned Parenthood of Wisconsin v. Doyle,*** 44 F. Supp.2d 975, 980 (W.D. Wis. 1999) ("[Dr.] Haskell, who invented the D&X procedure, admitted that the D&X procedure is never medically necessary to . . . preserve the health of a woman."). Likewise, the American College of Obstetricians and Gynecologists, a staunch opponent of all legal restrictions on abortion, including bans on partial-birth abortion, has reported that *"A select panel convened by ACOG could identify no circumstances under which this [D&X] procedure . . . would be the only option to save the life or preserve the health of the woman."* (emphasis added) (J.A. 1484). In other words, safe alternatives to partial-birth abortion remain available under Nebraska's statute as discussed below.

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ability of States to ban abortions by non-physicians even though it is possible some nurses or other professionals could perform abortions as skillfully as some physicians. ***See Hope Clinic,*** 195 F.3d at 873.

i. Both the D&E abortion procedure and the induction procedure are safe alternatives available under Nebraska law.

Nationwide, the testimony in partial-birth abortion cases establishes that both the D&E abortion procedure and the induction procedure[21] are safe alternative procedures. ***See, e.g., Evans,*** 977 F. Supp. at 1294 (testimony by five doctors that "the D&E procedure is a safe procedure"); ***Planned Parenthood of Southern Arizona Inc. v. Woods,*** 982 F. Supp. 1369, 1376 (D.Ariz. 1997) (finding of fact by the district court that D&E is a safe, medically acceptable abortion method in the second trimester); ***Doyle,*** 9 F. Supp. at 1045 (D&E is a "safe procedure"). ***See also Woods,*** 982 F. Supp. at 1376 (finding of fact that induction is a safe, medically acceptable abortion method in the second trimester); ***Planned Parenthood of Greater Iowa v. Miller,*** 1 F. Supp.2d 958 (S.D. Iowa 1998) (induction is a safe, routinely performed procedure after 15 weeks). These findings and testimony confirm the credibility of the State's witnesses in the present case regarding the safety of both procedures. (J.A. 636).

In light of the fact that the D&E and induction procedures are safe procedures for the mother, a ban on only the partial-birth abortion/D&X procedure would still leave women with safe alternatives. ***See Doyle,*** 9

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[21] The induction procedure is used after 15 weeks of gestation. Modern inductions involve induced labor and delivery through the use of prostaglandins. (***See*** Supp.App. 24-25). Although once considered less safe than the D&E, the evidence now shows that modern inductions are equally safe, if not safer, during the gestational period at issue in this case. (J.A. 696); (R.Tr. 306) (Eighth Cir. App. 575); ***Hope Clinic,*** 995 F. Supp. at 852; ***Planned Parenthood of Central New Jersey v. Verniero,*** 22 F. Supp.2d 331 (D.N.J. 1998); ***Evans v. Kelley,*** 977 F. Supp. at 1295 (inductions are safer than D&E after 18 weeks).

F. Supp.2d at 1044 ("Both the American Medical Association and the American College of Gynecologists recognize that a ban on intact D&E's leaves women with other appropriate abortion options.").[22]

ii. The rare complications and extreme cases put forth by the Respondent do not require partial-birth abortion.

Rare or unique fact patterns or hypothetical complications are not sufficient to invalidate the statute. ***Webster,*** 492 U.S. at 524 (O'Connor, J., concurring). Furthermore, even the rare complications and extreme cases postulated by the Respondent do not require partial-birth abortion.

Dr. Frank Boehm, objectively one of the top OB-GYNs in the U.S.[23], testified that Nebraska's ban on partial-birth abortion would not increase a woman's risk of disseminated intravascular coagulopathy (DIC) (J.A. 642-643). Likewise, he testified that banning partial-birth abortion would not enhance or increase the risk to women of amniotic fluid embolus. (J.A. 643-644). Dr. Boehm's testimony was the only objective and credible

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[22] ***See*** footnote 13, ***supra*** at 28.

[23] Dr. Boehm has been repeatedly named one of the Best Doctors in America based on national peer recommendations. (J.A. 642-643). He was also named one of the Best Doctors For Women in the United States in August 1997 by Good Housekeeping Magazine. (J.A. 571). His medical specialty is obstetrics and gynecology with a subspecialty in maternal-fetal medicine. He is a Professor of Obstetrics and Gynecology at Vanderbilt Medical Center and is the Director of Obstetrics for the hospital. He is board certified in obstetrics and gynecology and in maternal-fetal medicine. (J.A. 563). Dr. Boehm has published over 120 articles, including an article on abortion risk factors. (J.A. 573-586). He has written three books and 24 book chapters. (J.A. 586-590).

expert testimony on this subject. Dr. Boehm also testified that where an unborn child has severe hydrocephaly, causing the head to be too large to pass through the cervix, he would use an ultrasound-guided cepholocentis procedure to "drain the ventricles of the amniotic fluid to allow the head to slip through the cervix." (J.A. 700-702). Dr. Boehm specifically testified that "We don't try to aspirate intracranial cerebral matter or brain matter." (J.A. 703).[24]

d. Partial-birth abortion/D&X is not safer than available alternatives.

As discussed above, a State may ban a particular abortion procedure where safe alternative procedures remain available. It is unnecessary, under this test, to ascertain the precise level of relative safety of each procedure (even if data was available to make such a determination). Nonetheless, the State wishes to address the incredible conclusion of the district court below that partial-birth abortion/D&X "is superior to, and safer than, the D&E and other abortion procedures." (Supp.App. 190). This conclusion is simply not supportable in light of the fact that only a handful of physicians in the entire country use the procedure even occasionally, and there are no studies showing its safety. The conclusion of the district court is particularly suspect in light of

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[24] The "head first" procedure discussed at great length by Dr. Stubblefield is not within the proscription of Nebraska's statute, and is therefore totally irrelevant. In this head first procedure, no part of a living child is delivered into the vagina before killing the child, let alone a substantial portion. (J.A. 279-281). Furthermore, as described by Dr. Stubblefield, the "headfirst" procedure was allegedly necessary to save the life of the mother. Such situations are covered by an express exclusion from Nebraska's statute.

the fact it goes beyond the position argued by the Plaintiff/Respondent at trial. This section will discuss the evidence before the Court on the issue of the relative safety of the D&X procedure.

i. There are no medical studies showing the safety of the partial-birth abortion/D&X procedure.

The uncontroverted evidence before the Court is that there are no medical studies establishing the safety of the partial-birth abortion/D&X procedure. Dr. Frank Boehm, who is an expert in the field of abortion (J.A. 561-598), testified that the safety of the D&X procedure has never been medically proven and that he is not aware of any ongoing studies in this area. (J.A. 630). This fact was also confirmed by the Respondent's witness, Dr. Phillip Stubblefield (J.A. 308, 310-311), as well as Stanley Henshaw (J.A. 18). The absence of such evidence is legally devastating to the Respondent's case, especially in light of the deference owed to state legislative enactments by federal courts. ***See Hope Clinic,*** 195 F.3d 857.

ii. There are no medical studies comparing the safety of partial-birth abortion/D&X to other abortion procedures.

The uncontroverted evidence before the Court is that there are no medical studies comparing the safety of partial-birth abortion/D&X to other abortion procedures.

The Respondent's own witness, Dr. Stubblefield, admitted at trial that there are no medical studies that compare the safety of the D&X abortion procedure with other abortion procedures. (J.A. 308). Dr. Stubblefield acknowledged that "the safety of the intact D&X procedure" has never "been studied to the point that it has been medically-accepted fact that it is a safer abortion procedure." (J.A. 310-311).

Likewise, Dr. Boehm testified as follows: "There's never been to my knowledge any studies that have compared the trauma to a woman's uterus, cervix, or other vital organs with either [the D&X or D&E] technique." (J.A. 628). "No studies have been done to show [relative safety] . . . one compared to another." (J.A. 634). "[N]o one has ever done any research on partial-birth abortion and compared it to other procedures." (J.A. 704).

e. A ban on partial-birth abortion/D&X would create no risk to the health of women.

The testimony of medical experts in this case shows that a ban on partial-birth abortion would create no risk to the health of women. The State's lead witness was Dr. Frank Henry Boehm.[25] Dr. Boehm is a medical expert on abortion procedures, and is staunchly "pro-choice." (J.A. 620) ("I have not wavered in my advocacy of the pro-choice movement."); (J.A. 661) ("I want in no way to erode further the ability of women to obtain a safe abortion. And that would include all the procedures . . . other than the intact D&X."). He is a significant financial contributor to Planned Parenthood. (J.A. 645). He has performed abortions in a clinic setting and also at Vanderbilt Medical Center. (J.A. 622). Dr. Boehm continues to do second trimester abortions on a regular basis, including abortions involving congenital anomaly where there are "serious malformations of the fetus." (J.A. 621).

Dr. Boehm is currently conducting fetal research, and has even done a video on ACOG forceps guidelines. (J.A. 598). He received no pay for his testimony. Unlike any other witness for either party, this witness has no self interest in the proceeding and is not philosophically aligned with the party for whom he testified or any organization aligned with such party. In fact, he is the

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[25] *See* footnote 23, ***supra*** at 37.

only witness with a contrary position on abortion to the party calling him as a witness. The Court could not ask for a more qualified, credible medical expert in this area than Dr. Boehm.[26]

In addition to Dr. Boehm, the State presented testimony from another highly-qualified OB-GYN. Dr. Christopher Riegel is a Diplomat of the American Board of OB-GYN and an obstetrician, gynecologist, and infertility specialist in Dallas, Texas (J.A. 164). Dr. Riegel was trained in a four-year internship and residency in Obstetrics and Gynecology at Parkland Hospital in Dallas at the University of Texas, Southwestern Medical School. This program is considered one of the top OB-GYN programs in the United States. (J.A. 164). In fact, this is where Williams Obstetrics is published. (J.A. 220). Although the district court concluded that it did not initially find some of Dr. Riegel's testimony "credible," later testimony, including some by the Respondent's own witnesses, as well as Dr. Boehm, independently confirmed his testimony.[27]

Dr. Boehm testified that he does not know of any situations "in which an intact D&X abortion procedure

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[26] In contrast, the Respondent in this case performs abortions in a clinic setting. (J.A. 30). He is not Board certified. (J.A. 82-83). He is not an OB-GYN. In fact, he doesn't even have hospital privileges. (J.A. 83-84).

[27] The only exception was Dr. Riegel's testimony regarding the safety of the head piercing procedure. However, the Respondent's witness on this issue also testified that he had not performed the procedure nor seen it performed. (J.A. 324). Thus, the district court simply had conflicting testimony on this point. Dr. Riegel's testimony regarding the "non-existence" of the partial-birth abortion/D&X procedure in medical texts (J.A. 220) was confirmed repeatedly by other witnesses, and the State remains mystified by the district court's seeming ridicule of Dr. Riegel on this undisputed point. *Carhart*, 972 F. Supp. at 518-519 (Supp.App. 45).

would be a safer abortion procedure for a woman" than the alternative procedures. (J.A. 634). He further testified that *"the banning of the partial-birth abortion as defined by LB 23," would not create "any adverse medical risk to the health of any woman seeking an abortion."* (J.A. 636) (emphasis added). He further testified that the reason such a ban would create no adverse medical risk to the health of any woman seeking an abortion is that "there are safe alternatives," including inductions with prostaglandin, and also D&E abortions. (J.A. 636). Significantly, Dr. Boehm testified that a *nearly identical statute in effect in his state of practice does not affect his "ability to perform medically safe abortions."* (J.A. 636-637). ***See*** Brief of Amicus Curiae Family First (data from States where partial-birth abortion statutes are in effect showing no impact on D&E or other abortion methods). ***See also Hope Clinic,*** 195 F.3d at 870 ("Thirty States enacted laws forbidding most partial-birth abortions. Judges prohibited the application of these laws in two-thirds of these States. In the other third the statutes have been in force. One way to perform a reality check on . . . [whether] these statutes cover only the D&X is to see what has happened in the States where the laws have been permitted to take effect.").

Dr. Boehm further testified that "the legislative ban on partial-birth abortion as defined by [Nebraska's Statute]" would not cause a woman seeking abortion to have to undergo an "alternative procedure which would create a higher risk of harm to her uterus, cervix, or internal organs." (J.A. 641). When asked why, he responded "for a variety of reasons. One is that we've been performing abortions for years on women safely with other techniques, and we don't have any data that would say that another technique such as partial-birth abortion is any safer." (J.A. 641). Dr. Boehm also specifically addressed the extreme case scenarios put forth by the Respondent. (J.A. 642-644) ***See*** discussion, ***supra*** at 37-38.

Dr. Boehm's testimony is even more compelling when one considers that the evidence before the Court

conclusively establishes that partial-birth abortion/D&X is an unpredictable procedure at best when performed by Dr. Carhart. Dr. Carhart testified the procedure fails to produce an intact extraction 90-95% of the time. (J.A. 61). Therefore, most of the time the Respondent fails to obtain intact extraction and must use standard D&E procedures anyway. Even in cases where it is successfully performed by Dr. Carhart, many of the same procedural methods of a D&E are still utilized. Dr. Carhart testified that following removal of the unborn child from the uterus, vacuum aspiration is performed within the uterus, and also "sharp curettage" is performed "to clean the uterus." (J.A. 45).

The testimony given by the State's expert medical witnesses is reliable and consistent with the views of other credible experts on the subject. Where a State adopts a statute patterned after federal legislation, it is appropriate for courts construing the state legislation to seek guidance from the federal legislative history developed by Congress. This is particularly appropriate in the present case since Nebraska's partial-birth abortion statute is nearly identical to that considered and passed overwhelmingly by both Houses of Congress. The extensive legislative history of the federal legislation demonstrates that the witnesses and evidence presented by the State of Nebraska are credible, and that their testimony is consistent with the view of most of the medical community, including some prominent abortion practitioners.

The Congressional legislative history of the "Partial-Birth Abortion Ban Act of 1995," HR 1833, 105th Cong. (1995) (as well as for the 1996 & 1997 legislation), contains extensive testimony regarding the safety of partial-birth abortion. The testimony shows (as confirmed by the evidence before this court) that "claims of safety are not substantiated," and "data for a safety evaluation is not available." ***Id.*** at 180. Other medical testimony was presented that there is no medical reason to ever use the procedure. ***Id.*** at 233.

Dr. Warren Hern, a "leading practitioner of late-term abortions and author of the most widely used textbook on abortion standards and procedures," *id.* at 356, was quoted, in Congressional testimony, that *"he could not imagine a circumstance in which this procedure would be safest."* *Id.* (emphasis added). Testimony from Dr. Pamela Smith, Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital in Chicago, testified that "the only interest served by the partial-birth abortion procedure is the 'convenience' of the abortionist." *Id.* at 357. Consistent with the evidence before the Court in this case, Dr. Nancy Romer is quoted as stating "there is simply no data anywhere in the medical literature in regards to the safety and efficacy" of partial birth abortion. *Id.* at 357. Thus, the legislative history of the federal legislation shows that the testimony of the State's witnesses is reliable. In sum, a ban on partial-birth abortion/D&X would create no risk to the health of women.

f. The testimony offered on behalf of Respondent Carhart as to the safety of partial-birth abortion/D&X is unreliable and inconclusive.

In contrast to the testimony of the State's witnesses, the testimony of the Respondent's witnesses appears consistent with only a relative handful of physicians. The testimony offered on behalf of Dr. Carhart as to the safety of partial-birth abortion is unreliable and inconclusive. For example, Dr. Stubblefield's testimony on the comparative safety issue is simply not credible. He claimed (using speculative terms such as "theoretically" and "it makes sense") that the D&X is safer than the D&E procedure due to less instrumentation. (J.A. 276). Yet, he then testified that in his own practice he plans "to extend our D&Es to 20 weeks" and "stop doing" induction abortions during this period. (J.A. 294). This is inconsistent. If increased instrumentation was really a health risk, he

would not be preparing to take the opposite action. This is especially revealing in light of the fact that modern induction procedures are not otherwise considered less safe than D&Es.[28] His motivation was admittedly "cost saving" and "convenience." (J.A. 294). Similarly, Dr. Carhart (who insists the D&X procedure is performed to benefit the mother) testified that he never bothers to convert the child to a footfirst position to facilitate use of the procedure, but rather just takes the body however it presents itself. (J.A. 56) ("I just attempt to bring out whatever is the most proximal portion of the fetus."). If the health benefits of the procedure are really as he claims, this is illogical and inconsistent. Perhaps it is a tacit admission that deliberate breech delivery is, in fact, a health risk.

Finally, and perhaps most importantly, the Respondent presented no statistical evidence or data of any kind showing that partial-birth abortion/D&X is a medically safer procedure than alternative procedures. In fact, the record shows that reliable complication rates associated with various procedures and by gestational age are simply not available. (J.A. 1153). Therefore, data is not available to support "any firm conclusions about the relative safety of procedures." *Id.*

g. In the absence of objective and conclusive research data, the safety of medical procedures for purposes of state regulation of the medical profession is a state legislative determination which should not be disturbed by federal courts.

The Court should defer to the judgment of the state legislative branch on the relative safety of medical procedures in the absence of clear, definite and compelling evidence establishing that the legislative determination is

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[28] *See* footnote 21, *supra* at 36.

unreasonable. *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983). Where, as here, no medical data is available to support the Respondent's assertions, and where opinions by medical witnesses are in disagreement, the decision regarding the regulation of medical procedures should be left to the state legislature. In such circumstances, the Court should defer to the state legislative body as a matter of federalism and separation of powers. In short, a federal court should not substitute its judgment about medical issues for that of a state legislature where the plaintiff fails to present objective and conclusive research data supporting his assertions.

The Nebraska Legislature, following the lead of Congress, and relying on medical opinion that the partial-birth abortion/D&X procedure is medically unnecessary and of untested or questionable safety, voted nearly unanimously to ban its use.[29] When the legislation was challenged in district court, medical experts disagreed as to the safety of the procedure, but concurred that no medical studies exist on the subject. Under such circumstances, it is evident that the judgment of the legislature on the issue was not unreasonable. Furthermore, the collective judgment of the State's elected legislators is just as legitimate as the opinion of one federal district judge. In such cases deference should be given by this Court to the Nebraska Legislature rather than to the single federal judge (even as affirmed by an appellate panel using a clear error standard of review). This is a practical necessity unless single federal judges are to decide the scope of medical practice in each state – potentially in divergent ways in each one.

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[29] The district court expressly acknowledged that legislators thought the procedure was unsafe. (R.Tr. 14) (Eighth Cir. App. 282) ("I think it is the State's view . . . that it is not an accepted procedure, and as a matter of fact, it's more dangerous. Certainly that's what some of the legislators thought.").

Deference to legislative fact finding under such circumstances is not a new or unfamiliar legal proposition to the Court. ***See Kansas v. Hendricks,*** 521 U.S. 346, 360 n.3 (1997) ("it is precisely where such disagreement [among medical professionals] exists that legislatures have been afforded the widest latitude in drafting . . . statutes."); ***Jones v. United States,*** 463 U.S. at 365 n.13 ("The lesson we have drawn is not that government may not act in the face of this [scientific] uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments."); ***Marshall v. United States,*** 414 U.S. 417, 427 (1974) ("[M]edical uncertainties afford little basis for judicial responses in absolute terms.").

As the Seventh Circuit stated in ***Hope Clinic v. Ryan,*** "The question in the end is not what one or another judge found on a given record; it is whether the state legislatures exceeded their constitutional powers. Factual premises underlying legislation normally are not subject to review by trial courts." ***Hope Clinic v. Ryan,*** 195 F.3d at 872. "[I]t is significant that *none of the Supreme Court decisions in abortion cases suggests that the same law would be constitutional in one state, and unconstitutional in another, depending on a district judge's resolution of factual disputes.*" ***Id.*** at 873 (emphasis added). Even the dissenting judges in ***Hope Clinic*** stated that "the health effects of 'partial-birth' abortion . . . should indeed be treated as legislative fact rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges, sheltered by the deferential 'clear error' standard of appellate review of fact findings, to different records." ***Hope Clinic,*** 195 F.3d at 884 (Posner, dissenting).

In the present case, since objective and conclusive evidence supporting the Respondent is absent, the legislative determination regarding the D&X procedure should not be disturbed by the Court.

3. The Effect of Nebraska's Statute Is to Serve Legitimate State Interests Which Do Not Strike at the Right to Choose an Abortion.

As shown above, Nebraska's partial-birth abortion statute does not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion. Rather, the effect of Nebraska's statute is to serve legitimate state interests which do not strike at the right to choose an abortion. The legitimacy of the state interests stems from two basic facts. First, partial-birth abortion is performed only on late-term developing children. The procedure is usually performed in the days and weeks just prior to viability (if not after).[30] At this time, the State's interest in the life of the unborn child is at or near its zenith. The State's interest is so strong that the State is just short of being able to completely ban nontherapeutic abortions. ***Roe v. Wade***, 410 U.S. at 164-165 (the State's interest "grows in substantiality as the woman approaches term"). Second, the subject of the procedure is mostly outside of the womb. This fact is significant since ***Roe*** and ***Casey*** dealt only with "the unborn."

Under *Casey*, the State's interests need not be "compelling." Nonetheless, the State of Nebraska has important, if not compelling, interests which underlie its statute and which are served by the ban on partial-birth abortion. The statute has the effect of serving the State's interests in "show[ing] concern for the life of the unborn," and, more specifically, for the partially-born. ***Casey***, 505 U.S. at 869. It also serves the State's interest in preventing cruelty to partially-born children and "unacceptable disrespect for potential human life," ***id.*** at 914 (Stevens, J., concurring). The statute also serves the State's interest in preserving the integrity of the medical profession. ***Washington v. Glucksberg***, 521 U.S. 702 (1997); (J.A. 640). ***See also Doyle***, 162 F.3d at 478 (Manion,

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[30] ***See*** footnote 16, ***supra***, at 32.

J., dissenting) ("The State's interest in potential life, in regulating the practice of medicine and in the moral underpinnings of state law are legitimate and form a solid basis for the State enacting a statute to ban D&X abortions.").

The State has a substantial interest in protecting or at least showing concern for a child in an induced birth process. In the D&X procedure, the child is more outside the womb than inside. They are no longer "unborn." Furthermore, the State has a compelling interest in erecting a barrier to infanticide. Partial-birth abortion blurs the distinction between abortion and infanticide. This is undoubtedly why thirty state legislatures and both Houses of Congress (with the support of large numbers of pro-choice legislators) reacted so decisively to ban a procedure that is performed on late-term infants and which looks, to many, like infanticide.[31]

CONCLUSION

Nebraska's ban on partial-birth/D&X abortion can reasonably be construed as not encompassing the more common D&E abortion procedure, thereby leaving women a safe alternative procedure and avoiding the creation of an undue burden on the right to choose whether to terminate a pregnancy. In accordance with

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[31] These interests are undiminished, indeed unaffected, by the fact the statute does not "forbid the destruction of any class of fetuses," nor by the fact it does not ban all cruel forms of abortion, as posited by the dissenters in ***Hope Clinic***, 195 F.3d at 878. For example, in ***Ashcroft***, 462 U.S. at 486, the Court upheld a second-physician requirement even though live births were unlikely. Similarly, the State's interest in the life of the unborn child is still legitimate here (even though live delivery is not always, or even frequently possible) since live delivery is sometimes possible. (J.A. 49) (Carhart testimony that "If you have adequate dilation, yes, the skull can fit through the cervix.").

cardinal rules of construction and fundamental principles of federalism, and in recognition of the State's legitimate interests, the Court should reverse the decisions below and affirm the authority of the Nebraska Legislature to ban the partial-birth abortion/D&X procedure.

Respectfully submitted,

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